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October 12, 2018

Via ECF

Honorable Lois Bloom, U.S.M.J.
U. S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

**Re: *Steven B. Barger v. First Data Corporation et al.*
Civil Case No. 1:17-cv-4869**

Dear Judge Bloom:

As directed by the Court on September 19, 2018, this is Defendants' status report on the three outstanding non-party depositions, none of which have yet to occur due to extraordinary efforts undertaken by the deponents to avoid testifying despite being subpoenaed.

1. Deposition of Julie Kelly

On May 23, 2018, Julie Kelly was served with a subpoena, directing her to appear for a deposition on June 25, 2018, in her home city of Cincinnati, Ohio. Kelly is a *pro se* witness in this matter, although Shawn Shearer is representing her in an unrelated discrimination charge that was filed after Kelly was identified on Defendants' Initial Disclosures as a possible witness. Defendants were forced to file a Motion to Compel Kelly to attend a deposition. *See Barger v. First Data Corporation et al.* Case No. 1:18-mc-00010-SJD-SKB, United States District Court for the Southern District of Ohio. Kelly has filed two Motions for Protective Orders and a Rule 72(a) Objection to Magistrate Judge Bowman's Order compelling Kelly's deposition.¹

On October 9, 2018, District Judge Susan Dlott denied Kelly's Motion for Sanctions (ECF No. 7), Motion for 72(a) (ECF No. 24), Motion for Protective Order (ECF No. 27), and Motion to Reconsider Obtaining Electronic Case Filing Rights (ECF No. 28), and ordered Kelly to appear for her deposition on October 15, 2018, at the federal courthouse with the subpoenaed

¹ A copy of the docket in Case No. 1:18-mc-00010-SJD-SKB is attached as Exhibit A. Even though she is *pro se*, Kelly was somehow able to obtain a full copy of the Defendants' Initial Disclosures in this case—which is not a public record but rather exchanged by counsel—and she also attached to her pleadings in Ohio, pages from deposition transcripts of witnesses in this case that were marked "Confidential" and subject to Protective Order. Defendants did not provide her with these transcripts.

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documents. *See Exhibit B*, Judge Dlott's October 9, 2018 Order Denying Interested Party's Motion for 72(a) and Affirming Magistrate Judge's Order to Compel Deposition. Today, Barger's counsel filed a Motion for a Protective Order (ECF No. 76) to prevent Kelly's deposition. Shearer does not mention Judge Dlott's October 9, 2018 Order compelling Kelly to appear. Defendants will be in Cincinnati, Ohio on Monday, October 15, 2018, prepared to complete Kelly's deposition pursuant to multiple court orders.

2. Depositions of Phillip Morgan (Barger's Accountant) and Grant Barger (Barger's son)

Defendants served subpoenas on Phillip Morgan and Grant Barger directing them to appear for depositions on September 17, 2018, in Birmingham, Alabama. Prior to September 17, 2018, Defendants attempted to confirm that the witnesses were available on that date, and if not, discuss alternative dates. Defendants did not receive a response confirming their attendance. Instead, on Friday, September 14, 2018, Grant Barger, appearing *pro se* on behalf of himself and Morgan, filed a Motion to Quash and for a Protective Order in the United States District Court for the Northern District of Alabama styled as *Grant Barger v. Saul Ewing Arnstein & Lehr and Gary Eidelman*, Case No. 2:18-mc-01491-KOB, objecting to being deposed.²

Defendants filed a Motion to Compel the depositions of Grant Barger and Morgan in the United States District Court for the Northern District of Alabama. *See Barger v. First Data Corporation et al.*, Case No. 2:18-mc-01569-KOB. The matter has been assigned to Chief Judge Karon O. Bowdre. In response to the Motion to Compel, Grant Barger filed an opposition and another Motion to Quash and for Protective Order.³ Defendants' response is due Monday, October 15, 2018. Defendants are hopeful that Judge Bowdre will rule on the outstanding motions promptly.

3. Expert Depositions

Depositions of both expert witnesses are scheduled for October 30, 2018, in New York.

Please advise if the Court would like Defendants to provide another status report.

Respectfully submitted,

/s/ Gary B. Eidelman

Gary B. Eidelman

cc: Counsel of Record (via ECF)

² The Motion to Quash Grant Barger initially opened on September 14, 2018, was closed for procedural reasons.

³ As noted above, Grant Barger is representing himself and Morgan *pro se*. Remarkably, the pleadings he filed and the objections to the documents sought by the subpoena are substantially similar to the pleadings that Kelly filed in the Southern District of Ohio and document objections she served.

EXHIBIT A

CASREF

**U.S. District Court
Southern District of Ohio (Cincinnati)
CIVIL DOCKET FOR CASE #: 1:18-mc-00010-SJD-SKB**

Barger v. First Data Corporation, et al.

Date Filed: 07/23/2018

Assigned to: Judge Susan J. Dlott

Referred to: Magistrate Judge Stephanie K. Bowman

Case in other court: Eastern District of New York, 1:17cv04869

Cause: No cause code entered

Interested Party**Julie K. Kelly**represented by **Julie K. Kelly**

823 Dorgene Lane
Cincinnati, OH 45244
5138064893
PRO SE

Plaintiff**Steven B. Barger**

V.

Defendant**First Data Corporation**represented by **Matthew Richard Byrne**

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Gillian A. Cooper

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Defendant

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Gillian A. Cooper
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Defendant

Dan Charron

represented by **Matthew Richard Byrne**
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Gillian A. Cooper
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Defendant

Anthony Marino

represented by **Matthew Richard Byrne**
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Gillian A. Cooper
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Defendant

Karen Whalen

represented by **Matthew Richard Byrne**
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Gillian A. Cooper
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant**Rhonda Johnson**represented by **Matthew Richard Byrne**

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED***Gillian A. Cooper**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
07/23/2018	<u>1</u>	MOTION to Compel <i>Third Party Witness to Comply with Deposition Subpoena</i> by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # <u>1</u> Declaration of Gillian A. Cooper, Esq. with Exhibits A-I, # <u>2</u> Text of Proposed Order) (Byrne, Matthew) (Entered: 07/23/2018)
07/23/2018	<u>2</u>	Filing fee: \$ 47.00, receipt number 100CIN034648 (bjc) (Entered: 07/23/2018)
07/27/2018	<u>3</u>	RESPONSE in Opposition re <u>1</u> MOTION to Compel <i>Third Party Witness to Comply with Deposition Subpoena</i> filed by Interested Party Julie K. Kelly. (Attachments: # <u>1</u> Exhibits) (bjc) (Entered: 07/27/2018)
07/27/2018	<u>4</u>	MOTION to Quash by Interested Party Julie K. Kelly. (Attachments: # <u>1</u> Exhibits) (bjc) Modified docket text on 9/5/2018 (sct). (Entered: 07/27/2018)
08/03/2018	<u>5</u>	Response in Opposition to Motion re <u>4</u> MOTION to Quash and REPLY to Response to Motion re <u>1</u> MOTION to Compel <i>Third Party Witness to Comply with Deposition Subpoena</i> filed by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # <u>1</u> Exhibit Declaration of Gillian A. Cooper, Esq.) (Byrne, Matthew) Modified docket text on 9/5/2018 (sct). (Entered: 08/03/2018)
08/14/2018	<u>7</u>	MOTION for Sanctions by Interested Party Julie K. Kelly. (Attachments: # <u>1</u> Exhibits) (bjc) Modified Docket Text on 8/15/2018 (bjc). (Entered: 08/14/2018)
08/14/2018		Minute Entry for proceedings held before Magistrate Judge Stephanie K. Bowman: Telephone Conference re: pending motion to compel and motion to quash held on 8/14/2018. Third Party Witness Julie Kelly appeared pro se. Attorneys Matthew Byrne and Gillian Cooper appeared on behalf of Defendants. The parties agree that Julie Kelly will appear for a deposition on 8/31/2018 at 12:00 PM at the law firm of Jackson Lewis, 201 E. Fifth Street, Cincinnati, OH. The deposition will conclude by 4:00 PM. Defendant First Data Corporation will reimburse Ms. Kelly for child care costs associated with the deposition. Ms. Kelly agrees to accept service of the subpoena for the 8/31/2018 deposition via regular mail. Ms. Kelly's motion for sanctions will be briefed and all motions will be formally ruled upon once briefing is complete. (km) (Entered: 08/14/2018)

08/29/2018	8	MOTION for Order to Grant 7 Motion for Sanctions by Interested Party Julie K. Kelly. (bjc) (Entered: 08/29/2018)
08/29/2018	9	NOTICE by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen re 8 MOTION for Order to <i>Grant Motion for Sanctions</i> (Byrne, Matthew) (Entered: 08/29/2018)
08/31/2018	10	MOTION for Protective Order by Interested Party Julie K. Kelly. (Attachments: # 1 Exhibits) (bjc) (Entered: 08/31/2018)
09/04/2018	11	RESPONSE in Opposition re 7 MOTION for Sanctions, 8 MOTION for Order to, 10 MOTION for Protective Order <i>and in further support of Defendants' Motion to Compel Third Party Witness (ECF No. 1)</i> filed by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Declaration of Gillian A. Cooper, Esq. with Exhibits A - E, # 2 Text of Proposed Order) (Byrne, Matthew) (Entered: 09/04/2018)
09/04/2018	12	MOTION to Expedite <i>Time for Kelly to Reply to ECF Nos. 7, 8, and 10</i> by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Text of Proposed Order) (Byrne, Matthew) (Entered: 09/04/2018)
09/04/2018	13	Supplement to 10 MOTION for Protective Order and REPLY to Response to Motion re 4 MOTION to Quash filed by Interested Party Julie K. Kelly. (Attachments: # 1 Exhibits A-C) (sct) (Entered: 09/05/2018)
09/05/2018	14	REPLY to Response to Motion re 1 MOTION to Compel <i>Third Party Witness to Comply with Deposition Subpoena</i> filed by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Declaration of Gillian A. Cooper with Exhibits A - E, # 2 Text of Proposed Order) (Byrne, Matthew) (Entered: 09/05/2018)
09/06/2018		NOTATION ORDER granting in part 12 Defendants' Motion to Expedite Briefing Time for Julie Kelly to Reply to ECF Nos. 7, 8, and 10. Because Ms. Kelly is proceeding pro se, she shall have until 9/14/2018 to file her reply memoranda in support of her motions 7 8 10 . The Court further SETS this matter for a telephone conference on all remaining issues on 9/18/2018 at 10:00 AM. Signed by Magistrate Judge Stephanie K. Bowman on 9/6/2018. (km) (Entered: 09/06/2018)
09/13/2018	17	REPLY to Response to Motion re 7 MOTION for Sanctions filed by Interested Party Julie K. Kelly. (eh) (Entered: 09/13/2018)
09/13/2018	18	MOTION by Pro Se Litigant to Obtain Electronic Case Filing Rights by Interested Party Julie K. Kelly. (eh) Modified Filer on 9/14/2018 (bjc). (Entered: 09/13/2018)
09/14/2018	19	MOTION for Extension of Time New date requested 9/17/2018. by Interested Party Julie K. Kelly. (bjc) (Entered: 09/14/2018)
09/17/2018	20	REPLY to Response to Motion re 10 MOTION for Protective Order filed by Interested Party Julie K. Kelly. (bjc) (Entered: 09/17/2018)
09/18/2018		Minute Entry for proceedings held before Magistrate Judge Stephanie K. Bowman: Telephone Conference held on 9/18/2018. Attorneys Matthew Byrne and Gillian Cooper

		appeared on behalf of Plaintiff. Third Party Julie Kelly appeared pro se. Written Order to follow. (km) (Entered: 09/19/2018)
09/19/2018	21	ORDER granting 1 Defendants' Motion to Compel Third Party Witness to Comply with Deposition Subpoena. Ms. Julie Kelly must appear for a deposition on 10/15/2018 at 12:00pm to be held at the U.S. Potter Stewart Courthouse, Room 203, 100 East Fifth Street, Cincinnati, Ohio 45202. Ms. Kelly must bring any and all documents in her possession as requested in the Subpoena previously issued for the 8/31/2018 deposition. The deposition will conclude at 5:00pm unless Defendants choose to conclude prior to 5:00pm. Unless otherwise agreed, Ms. Kelly shall be allowed two five minute breaks and one fifteen minute break during the five hour deposition. Defendants shall reimburse Ms. Kelly for reasonable child care expenses; denying 4 Julie Kelly's Motion to Quash; denying 8 Julie Kelly's Motion for an Order on Her Motion for Sanctions; denying 10 Julie Kelly's Motion for Protective Order; denying 18 Julie Kelly's Motion to Obtain Electronic Case Filing Rights, without prejudice to refile; granting 19 Julie Kelly's Motion for Extension of Time to File Reply Brief in Support of Motion for Protective Order. Signed by Magistrate Judge Stephanie K. Bowman on 9/19/2018. (km) (Entered: 09/19/2018)
09/21/2018	22	MOTION for Leave to Appear Pro Hac Vice (Filing fee of \$200 paid, receipt number 0648-6609816) of Gillian A. Cooper by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Certificates of Good Standing, # 2 Text of Proposed Order) (Byrne, Matthew) (Entered: 09/21/2018)
09/24/2018	23	ORDER granting 22 Motion for Leave to Appear Pro Hac Vice of Gillian A. Cooper. Signed by Judge Susan J. Dlott. (wam) (Entered: 09/24/2018)
10/02/2018	24	OBJECTIONS TO MAGISTRATE JUDGE ORDER 21 (Styled as a Motion for 72a) by Interested Party Julie K. Kelly. (Attachments: # 1 Exhibits) (bjc) Modified to Clarify Docket Text on 10/3/2018 (km). (Entered: 10/03/2018)
10/03/2018		Notice of Correction re: 24 Objection to Magistrate Judge Order 21 . The docket text has been corrected to correctly reflect that the filing is objections to the Magistrate Judge Order under FRCP 72(a). (km) (Entered: 10/03/2018)
10/05/2018	25	RESPONSE in Opposition re 24 Objection to Magistrate Judge Order re 21 Order on Motion to Compel,,,,, Order on Motion to Quash,,,,, Order on Motion for Order to,,,,, Order on Motion for Protective Order,,,,, Order on Motion for Miscellaneous Relief,,,,, Order on Motion for Extens filed by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Byrne, Matthew) (Entered: 10/05/2018)
10/05/2018	26	MOTION Shorten Time for Reply re 25 Response in Opposition to Motion, by Defendants Frank Bisignano, Dan Charron, First Data Corporation, Rhonda Johnson, Anthony Marino, Karen Whalen. (Attachments: # 1 Text of Proposed Order) (Byrne, Matthew) (Entered: 10/05/2018)
10/05/2018	27	MOTION for Protective Order by Interested Party Julie K. Kelly. (Attachments: # 1 Exhibits) (mr) (Entered: 10/05/2018)

10/05/2018	28	MOTION To Reconsider by Pro Se Litigant to Obtain Electronic Case Filing Rights by Interested Party Julie K. Kelly. (mr) (Entered: 10/05/2018)
10/09/2018	29	ORDER ORDER DENYING INTERESTED PARTYS MOTION FOR 72(A) AND AFFIRMING MAGISTRATE JUDGES ORDER TO COMPEL DEPOSITION. Ms. Kelly must appear for a deposition on October 15, 2018 at noon to be held at the United States Potter Stewart Courthouse, Room 203, 100 East Fifth Street, Cincinnati, Ohio 45202. Ms. Kelly must bring any and all documents in her possession as requested in the Subpoena previously issued for the August 31, 2018 deposition. The deposition will conclude no later than 5:00 p.m. Unless otherwise agreed, Ms. Kelly shall be allowed two five minute breaks and one fifteen minute break during the five hour deposition. Defendants must reimburse Ms. Kelly for reasonable child care expenses. Ms. Kellys Motion for Sanctions (Doc. 7), Motion for 72a (Doc. 24), Motion for Protective Order (Doc. 27), and Motion to Reconsider Obtaining Electronic Case Filing Rights (Doc. 28) are denied. Defendants Motion to Shorten Time (Doc. 26) is also denied.. Signed by Judge Susan J. Dlott on 10/9/18. (wam) (Entered: 10/09/2018)
10/09/2018	30	RESPONSE in Opposition re 26 MOTION Shorten Time for Reply re 25 Response in Opposition to Motion, filed by Interested Party Julie K. Kelly. (jlw) (Entered: 10/10/2018)
10/10/2018	31	MOTION to Clarify 29 Order by Interested Party Julie K. Kelly. (jlw) (Entered: 10/10/2018)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEVEN B. BARGER,	:	
	:	Case No. 1:18-mc-10
Plaintiff,	:	
	:	Judge Susan J. Dlott
v.	:	
	:	ORDER DENYING INTERESTED
FIRST DATA CORPORATION, <i>et al.</i> ,	:	PARTY'S MOTION FOR 72(A) AND
	:	AFFIRMING MAGISTRATE JUDGE'S
Defendants.	:	ORDER TO COMPEL DEPOSITION
	:	

This matter is before the Court on Interested Party Julie K. Kelly's Pro Se Motion for 72a (Doc. 24), appealing the Magistrate Judge's Order compelling Ms. Kelly to appear for a deposition in this matter (Doc. 21). Defendants' oppose Ms. Kelly's Motion for 72a (Doc. 25). Also pending are Ms. Kelly's Motion for Sanctions (Doc. 7), Ms. Kelly's Motion for Protective Order (Doc. 27), Ms. Kelly's Motion to Reconsider Obtaining Electronic Case Filing Rights (Doc. 28) and Defendants' Motion to Shorten Time (Doc. 26).

Pursuant to Federal Rule of Civil Procedure 72(a), the Court considered this matter and concludes that the Magistrate Judge's Order (Doc. 21) is neither clearly erroneous nor contrary to law. In an abundance of caution—and because the Interested Party is proceeding *pro se*—the Court thoroughly reviewed not only the Interested Party's Motion and the Defendants' Response but also every document filed in this miscellaneous action. After doing so, the Court hereby orders as follows:

1. Ms. Kelly must appear for a deposition on **October 15, 2018 at noon** to be held at the United States Potter Stewart Courthouse, Room 203, 100 East Fifth Street, Cincinnati, Ohio 45202. Ms. Kelly must bring any and all documents in her possession as requested in the Subpoena previously issued for the August 31, 2018 deposition. The deposition

will conclude no later than 5:00 p.m. Unless otherwise agreed, Ms. Kelly shall be allowed two five minute breaks and one fifteen minute break during the five hour deposition.

2. Defendants must reimburse Ms. Kelly for reasonable child care expenses.
3. Ms. Kelly's Motion for Sanctions (Doc. 7), Motion for 72a (Doc. 24), Motion for Protective Order (Doc. 27), and Motion to Reconsider Obtaining Electronic Case Filing Rights (Doc. 28) are denied.
4. Defendants' Motion to Shorten Time (Doc. 26) is also denied.

IT IS SO ORDERED.

Dated: 10/9/18

s/Susan J. Dlott
Judge Susan J. Dlott
United States District Court